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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 484

SEYMOUR SALES COMPANY, SEYMOUR GALTER, Individually and as an officer of Seymour Sales Company, and FLAVIA GALTER, as an officer of Seymour Sales Company,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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No.

SEYMOUR SALES COMPANY, SEYMOUR GALTER, Individually and as an officer of Seymour Sales Company, and FLAVIA GALTER, as an officer of Seymour Sales Company,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on November 4, 1954.

CITATIONS TO OPINIONS BELOW.

The decision of the Federal Trade Commission is printed in the certified copy of the Joint Appendix, p. 15-A, and in Appendix B hereto, *infra*, p. 3a. The opinion of the United States Court of Appeals for the District of Columbia Circuit is unreported and printed in Appendix B hereto, *infra*, p. 13a.

JURISDICTION.

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on November 4, 1954, and is printed in Appendix B hereto, *infra*, p. 18a. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED.

Whether the jurisdiction of the Federal Trade Commission extends to an indirect regulation of intrastate lotteries by the direct prohibition of interstate mailings of lottery devices when said devices are not sold or used in interstate commerce.

STATUTE INVOLVED.

The statutory provisions involved are Sections 4 and 5 of the Federal Trade Commission Act, 15 U. S. C. A., Section 45. They are printed in Appendix A, *infra*, pp. 1a, 2a.

STATEMENT.

A complaint was issued by the Federal Trade Commission on November 18, 1952 charging petitioners herein, Seymour Sales Company, and Seymour Galter and Flavia Galter individually and as officers of Seymour Sales Company with unfair acts and practices in commerce, specifically the interstate distribution of lottery devices (push cards) (App. 2-A). The answer of petitioners was filed denying among other things the jurisdiction of the Commission (App. 14-A). Hearings were held and on July 30, 1953, the Hearing Examiner filed his initial decision from which decision petitioners appealed. On November 25, 1953, the Commission denied the ap-

peal, and issued its Cease and Desist Order (App. 23-A). On January 20, 1954 the petitioners filed a petition to review the order of the Federal Trade Commission (App. 25-A) suggesting the Commission's lack of jurisdiction. The Court of Appeals for the District of Columbia Circuit on November 14, 1954 affirmed the decision of the Commission, rejecting the petitioners' contention as to the scope of the Commission's jurisdiction (Appendix B hereto, *infra,* p. 13a).

Seymour Sales Company is in the business of selling merchandise to the general public by direct mail. In the course of its opinion the Court of Appeals noted the following facts: (1) Petitioners did not manufacture or sell lottery devices; (2) the lotteries were conducted wholly within a state; (3) the lottery devices 'suggest' and 'encourage' merchandising by gambling. (Appendix B *infra,* p. 16a). The Commission had earlier found that petitioners did not conduct the lottery (App. 8-A, 10-A), but made possible the conduct of a lottery by others by mailing the lottery devices, together with solicitations for orders. These mailings were identical, except for non-essential detail, with the mailings in *United States* v. *Halseth,* 342 U. S. 277 (Tr. R., Halseth, pp. 14-18).

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below in the instant case is in conflict with the decision of this court in *United States* v. *Halseth,* 342 U. S. 277 (1952). Although *Halseth* was a criminal case, that fact was not the basis of the decision. The determination in *Halseth* by this court that there was no lottery in interstate commerce and therefore no violation of the statute involved (18 U. S. C., 1302) is apposite to the question presented herein. The interstate mailing of lottery devices not to be sold or used in interstate commerce is not an unfair act "in commerce", as commerce has been defined under the provisions of the Federal Trade Commission Act. The language of the criminal statute (18 U. S. C., 1302) analyzed by this court in *Halsteth* was sweeping. (Appendix A, *infra,* p. 2a) The gist of that statute is the phrase "concerning any lottery". This language gives as broad a scope to the criminal statute as the phrase "unfair acts or deceptive acts or practices in commerce" gives to Section 5 of the Federal Trade Commission Act (Appendix A, *infra,* p. 1a). The decision in *Halseth* therefore, that the offense if any was purely local, should foreclose the jurisdiction of the Commission over the acts complained of herein.

The jurisdiction of the Commission with respect to interstate commerce has been strictly construed, *Federal Trade Commission* v. *Bunte Brothers,* 312 U. S. 349 (1941), and its narrow jurisdiction is in sharp contrast to that of the Interstate Commerce Commission (*Houston, E. & W. T. Ry. Co.* v. *U. S.,* 234 U. S. 342 (1914)), the broad scope of the Sherman Act (*Swift & Co.* v. *U. S.,* 196 U. S. 375, 1905) and the breadth of jurisdiction of

the National Labor Relations Board (*N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937)). This court held that the activities of *Bunte Brothers* were not unfair methods of competition in interstate commerce, although (1) *Bunte Brothers* were themselves conducting a lottery, and (2) interstate commerce was affected.

The Court of Appeals for the Second Circuit has held that the Federal Trade Commission was without jurisdiction despite the interstate shipment of merchandise where the acts complained of were intrastate, *Ward Baking Co.* v. *Federal Trade Commission*, 264 F. 330 (CA 2, 1920). The Court of Appeals for the Sixth Circuit has held similarly in *Canfield Oil* v. *Federal Trade Commission*, 274 F. 571 (C. A. 6, 1921). Neither court applied this reasoning in cases involving lottery devices (*Colon* v. *F. T. C.*, 193 F. 2d 179 (C. A. 2, 1952); *Brewer* v. *F. T. C.*, 158 F. 2d 74 (C. A. 6, 1946),), not attempting to distinguish the earlier cases. It was the interstate shipment of merchandise which was the foundation for the decision of the court below. (Appendix B, *infra*, p. 16a).

In the final analysis, it is the position of the Commission that it can restrain petitioners mailings *per se*. This is not the function of the Commission, but that of the Post Office Department.

2. Clearly, the question presented is of importance in the administration of the Federal Trade Commission Act. The Commission in the instant case has not only ventured into an area reserved for the state governments but has usurped a function of the Post Office Department of the federal government.

The Court of Appeals did not comment on the decision of this court in *F. C. C.* v. *American Broadcasting, Inc., et al.*, 347 U. S. 284, (1954), wherein this court pointed out that the Federal Communications Commission had unsuccessfully urged Congress to amend the law to prohibit the the radio "give away" program, and then sought to accomplish the same result by agency regulation. This court held that administrative action was not the remedy. The lack of social justification or desirability of lotteries does not give the Federal Trade Commission jurisdiction over acts which should be properly regulated locally.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

The following are the material portions of Sections 4 and 5, of the Federal Trade Commission Act, 15 U. S. C. A. Sec. 45:

Sec. 4. The words defined in this section shall have the following meaning when found in this Act, to wit:

"Commerce" means commerce among the several States or foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any States or foreign nation, or between the District of Columbia and any State or Territory or foreign nation."

Sec. 5. "(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful. The Commission is empowered and directed to prevent persons, partnerships, or corporations, * * *, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

"(b) Whenever the Commission shall have reason to believe that any such person, * * *, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing * * *. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections * * * of this title,

it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice."

The relevant portion of 18 U. S. C. 1302 provides:

"Whoever knowingly deposits in the mail, or sends or delivers by mail: any letter, package, postal card, or circulars *concerning any lottery,* or similar scheme offering prizes dependent in whole or in part, upon lot or chance; * * * shall be fined * * * or imprisoned * * *" (Italics ours).

APPENDIX B.

DECISION AND ORDER OF COMMISSION

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Edward F. Howrey, Chairman
Lowell B. Mason
James M. Mead
Albert A. Carretta
John W. Gwynne

In the Matter of
SEYMOUR SALES COMPANY

(erroneously named in the complaint as Seymour Sales, Inc.) and

SEYMOUR GALTER, and
FLAVIA GALTER,

individually and as officers of Seymour Sales Company

Docket No. 6060

Decision of the Commission and Order to File Report of Compliance

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on November 18, 1952, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and

the filing of respondents' answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final consideration by said hearing examiner upon the complaint, answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel (oral argument not having been requested), and said hearing examiner, on July 30, 1953, filed his initial decision herein.

Within the time permitted by the Commission's Rules of Practice, respondents filed an appeal from said initial decision, and the Commission, after duly considering said appeal and the record herein, issued its order denying said appeal.

The Commission is of the opinion, however, that the initial decision of the hearing examiner is not appropriate in all respects to dispose of this proceeding, principally because the order therein is inconsistent with the form of order which the United States Court of Appeals for the District of Columbia has determined is appropriate in cases where the facts are essentially similar to those in this case. *Hamilton Manufacturing Company* v. *Federal Trade Commission*, 194 F. 2d 346; *U. S. Printing & Novelty Co., Inc.* v. *Federal Trade Commission*, 204 F. 2d 737. Therefore, the Commission, being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order, the same to be in lieu of the initial decision of the hearing examiner:

Findings as to the Facts

PARAGRAPH ONE: Respondent Seymour Sa Sales Com- pany (incorrectly named in the complaint as s Seymour Sales, Inc.) is a corporation organized and do loing busi- ness under and by virtue of the laws of the e State of Illinois, with its office and principal place of f business located at 172 North Union Street, Chicago, o, Illinois. Respondents Seymour Galter and Flavia Galte er are in- dividuals and officers of the corporate respond dent. Re- spondent Seymour Galter has his office and l place of business located at the same address as the c corporate respondent, and owns and has dominant contro rol of the policies and sales activities of the corporate res espondent, and has cooperated and acted in concert with n said re- spondent in doing the acts and things hereinafte ter found.

Respondent Flavia Galter, although an officer er of the corporate respondent, owns no stock therein and d takes no active part in the operation of the business. The e proceed- ing will therefore be dismissed as to said respo pondent in her individual capacity, and the term "respond ndents" as hereinafter used does not include said Flavia Gal alter.

PARAGRAPH TWO: Respondents are now, a and since approximately September 1951 have been, engage ged in the sale and distribution of cameras, pens, and other er articles of merchandise, and have caused said merchandi dise, when sold, to be transported from their place of bu usiness in Chicago, Illinois, to purchasers thereof located ed in the various States of the United States other than an Illinois, and in the District of Columbia. There is now w and has been for more than one year last past a su substantial course of trade by respondents in such mercha handise in commerce, as "commerce" is defined in the e Federal Trade Commission Act, between and among the he various

States of the United States and in the District of Columbia.

PARAGRAPH THREE: In the course and conduct of their business as described in Paragraph Two hereof, respondents in soliciting the sale of and in selling and distributing their merchandise furnish and have furnished various plans of merchandising which involve the operation of games of chance, gift enterprises, or lottery schemes when said merchandise is sold and distributed to the purchasing and consuming public. Among the methods and sales plans adopted and used by respondents, and which is typical of the practices of respondents, is the following:

Respondents distribute, and have distributed, by mail, to operators and to members of the public certain literature and instructions including, among other things, push cards, order blanks, circulars containing illustrations and descriptions of said merchandise and circulars explaining respondents' plan of selling and distributing their merchandise and of alloting it as premiums or prizes to the operators of said push cards and as prizes to members of the purchasing and consuming public who purchase chances or pushes on said cards. The number of mailings sent out by respondents is substantial, amounting to hundreds of thousands, of which approximately 1% result in orders for merchandise. Thus in the latter part of 1951 the number of mailings for a Falcon Camera amounted to approximately 400,000 to 500,000 which resulted in orders being received from approximately 1.3% of the recipients, while in 1952, out of approximately 750,000 mailings for a Flash Master Camera, approximately .8% to .9% resulted in orders.

A typical push card bears sixteen feminine names, with ruled columns on the back of said card for writing in the

name of the purchaser of the push corresponding to the feminine name selected. Said push card has sixteen partially perforated discs. Each of said discs bears one of the feminine names corresponding to those on the list. Concealed within each disc is a number, which is disclosed only when the customer pushes or separates a disc from the card. The push card also has a larger, master seal and concealed within the master seal is one of the feminine names appearing on the disc. The person selecting the name corresponding with the one under the master seal receives a camera. The push card bears the following legend or instructions:

"Lucky Name under Seal Receives A FALCON Candid Camera and 1 roll of film

Now You Can Take Photos In Black and White And COLOR

Enjoy these features in the FALCON —high speed ground lens, eye level viewfinder, fixed focus plastic case.

No. 1 pays 1¢ No. 9 pays 9¢
No. 19 pays 19¢ No. 22 pays 22¢
All others pay 29¢ NONE HIGHER

( ) (Master) (Seal) (Panel bearing seals and feminine names.)

(Picture of Camera)
No. 9 Receives

A Beautiful Pen (New Ball Point Type) (Picture of Pen)

Write Your Name on Reverse Side Opposite Name You Select"

A typical circular which is enclosed with one of respondents' mailings advises the recipient that he can

receive a camera (or whatever product is being offered) "almost as a gift" and explains how, through the use of the push card (referred to as a "sales card"), "friends, relatives, neighbors and co-workers" can also get a camera "almost as a gift." The following instructions as to the use of the "sales card" are included:

> "Concealed under each of the names on the enclosed sales card is a number. These numbers are not consecutive. A person who selects a name under which number 1 appears pays 1¢, number 9 pays 9¢, number 28 pays 28¢. All others pay 29¢. There are none higher than 29¢.
>
> "Its easy, isn't it? You'll want to get started at once; and then send the enclosed order form at the earliest possible moment to us. Then, as soon as we receive it, we will rush off to you two 'Flash-Masters,' and as an extra special two ball point pens —(the new, improved type.)"

The operator of the push card, after selling all of the chances and remitting the full amount of the proceeds to respondents, with an order form, receives without additional charge a duplicate of the prizes listed on the card. Thus, in the case of the push card above described, the operator, upon remitting the amount called for, would receive a camera and ball point pen himself, in addition to the camera awarded as a prize to the person selecting the name under the master seal and the pen awarded to the person selecting number 9 on the card.

Sales of respondents' merchandise by means of said push cards are made in accordance with the above-described legend or instructions, and said prizes or premiums are allotted to the customers or purchasers from said card in accordance with the above legend or instructions. Whether a purchaser receives an article of

merchandise or nothing for the amount of money paid, and the amount to be paid for the merchandise or the chance to receive said merchandise, are thus determined wholly by lot or chance. The articles of merchandise have a value substantially greater than the price paid for the chances or pushes.

Respondents furnish and have furnished various other push cards accompanied by order blanks, instructions, and other printed matter for use in the sale and distribution of their merchandise by means of games of chance, gift enterprises, or lottery schemes. The sales plans or methods involved in the sale of all of said merchandise by means of said other push cards are substantially the same as that hereinabove described, varying only in detail as to the merchandise distributed, the prices of chances, and the number of chances on each card.

PARAGRAPH FOUR: While the attorney in support of the complaint offered the testimony of only one person who, on three separate occasions, used push cards received from respondents in selling and distributing respondents' merchandise in accordance with the above-described plan, it may reasonably be inferred that the persons to whom respondents furnish and have furnished said push cards, generally or in a substantial number of instances, use the same in selling and distributing respondents' merchandise in accordance with the aforesaid plan. Even in the absence of any evidence concerning the manner in which the push cards were actually used by the recipients thereof, it is clear, from the cards themselves and from the accompanying literature, that they were designed and intended for use in the manner above described, and it may reasonably be inferred that they were so used generally or in a substantial number

of instances. While respondent Seymour Galter testified that there were "numerous" instances in which the push cards were returned unused with orders for merchandise, he was able to offer actual proof of only three such instances. Even accepting his testimony that there were "hundreds" of such instances, the fact remains that these were only a small percentage of the thousands of mailings on which orders were received. It is absurd to suppose that respondents would continue to engage in the empty and financially wasteful practice of enclosing push cards with each mailing of their literature, if such cards were not used in the manner for which they were obviously designed and intended.

It is therefore clear, and it is so found, that respondents thus supply to and place in the hands of others the means of conducting games of chance, gift enterprises, or lottery schemes in the sale of their merchandise in accordance with the sales plan hereinabove set forth. The use by respondents of said sales plans or methods in the sale of their merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plans or methods is a practice which is contrary to an established public policy of the Government of the United States.

PARAGRAPH FIVE: The sale of merchandise to the purchasing public in the manner above described involves a game of chance or the sale of a chance to procure one of the said articles of merchandise at a price much less than the normal retail price thereof. Many persons are attracted by said sales plans or methods used by respondents and the element of chance involved therein and thereby are induced to buy and sell respondents' merchandise.

The use by respondents of a sales plan or method involving distribution of merchandise by means of chance, lottery, or gift enterprise is contrary to the public interest and constitutes an unfair act and practice in commerce within the intent and meaning of the Federal Trade Commission Act.

Conclusion

The aforesaid acts and practices of respondents, as herein found, are all to the prejudice and injury of the public, and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Order

IT IS ORDERED that respondent Seymour Sales Company (incorrectly named in the complaint as Seymour Sales, Inc.), a corporation, and its officers, representatives, agents, and employees, and respondent Seymour Galter, individually and as an officer of said corporation, and his representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of cameras, pens, or other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others push cards, sales cards, punchboards, or other lottery devices, either with other merchandise or separately, which said push cards, sales cards, punchboards, or other lotter devices are designed or intended to be used in the sale or distribution of said merchandise to the public.

2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, or lottery scheme.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed as to the respondent Flavia Galter in her individual capacity but not as an officer of the corporate respondent.

IT IS FURTHER ORDERED that respondents Seymour Sales Company and Seymour Galter shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

By the Commission.

Alex. Akerman, Jr.

(SEAL) Alex. Akerman, Jr.
Secretary.

ISSUED: November 25, 1953

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12064

SEYMOUR SALES COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petition for Review of Order of the Federal Trade Commission

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Decided November 4, 1954

Mr. Howard R. Koven, of the bar of the Supreme Court of Illinois, *pro hac vice,* by special leave of Court, with whom *Mr. Arnold F. Shaw* was on the brief, for petitioners.

Mr. Alan B. Hobbes, Special Attorney, Federal Trade Commission, with whom *Mr. Robert B. Dawkins,* Assistant General Counsel, Federal Trade Commission, was on the brief, for respondent.

Before EDGERTON, PRETTYMAN and FAHY, Circuit Judges.

FAHY, *Circuit Judge*: We are asked to set aside an order of the Federal Trade Commission requiring petitioners to cease and desist from:

> "1. Supplying to or placing in the hands of others push cards, sales cards, punchboards, or other lottery devices, either with other merchandise or separately, which said push cards, sales cards, punchboards, or other lottery devices are designed or intended to be used in the sale or distribution of said merchandise to the public.

"2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, or lottery scheme."

Petitioners' main contention is that the acts which gave rise to the order occur in intrastate commerce and the Commission therefore is without jurisdiction, citing *Federal Trade Commission* v. *Bunte Brothers,* 312 U.S. 349.

The jurisdiction of the Commission is to prevent "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." 15 U.S.C. §45(a), 52 Stat. 111-112. By definition the Act limits "commerce", insofar as here material, to commerce "among the several States." 15 U.S.C. § 44. In *Bunte Brothers* it was held that this grant of jurisdiction was not coextensive with the reach of the Commerce Clause itself and did not extend to unfair methods of competition which only affected interstate commerce. Since the commerce involved was entirely within Illinois the Court held the Commission was without jurisdiction though the interstate commerce of competitors was affected by the practices. Here, as we shall see, petitioners' own commerce is interstate and the practices condemned by the Commission occur in its conduct, thus removing the case from the rule laid down in *Bunte Brothers.*

The findings of the Commission as to the nature and interstate characteristics of petitioners' practices are in outline as follows: Petitioners are located in Chicago. They sell and distribute cameras, pens, and other merchandise throughout the country by means of a mail order business. They send out literature and order blanks, receive orders and ship the merchandise,—all through interstate channels. They solicit, sell and distribute their merchandise in part by furnishing plans involving games of chance, gift enterprises, or lottery schemes to be con-

ducted not at petitioners' place of business but at the point of sale to the consuming public. Included in the literature are push cards, accompanied with instructions. A typical push card bears 16 feminine names with ruled columns on its reverse side for writing in the appropriate space the name of the purchaser of a push who selects the corresponding feminine name. The push cards have 16 discs, each bearing a feminine name corresponding to one on the list. Under each disc is a number which is disclosed when the customer separates the disc from the card. One of the names appearing on the disc is also concealed under a master seal and the person selecting the name corresponding to this one receives an article of merchandise. A typical circular advises that the recipient might receive a camera or other article "almost as a gift", and explains how through the use of the push card "friends, relatives, neighbors and co-workers" can also get a camera "almost as a gift". The instructions specify the amounts to be paid for the different numbers. After selling all the chances and remitting the full proceeds to petitioners, with an order form, the operator of the push card receives without additional charge a duplicate of the prize which goes to the winner.

As the Commission found, this manner of merchandising results in the purchaser either receiving an article or receiving nothing for the amount paid, the amount is determined wholly by lot or chance, and the article has a value substantially greater than the price paid for the chance.[1]

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[1] No separate argument is made by petitioners that, if the Commission's order is otherwise valid and supported by the evidence, its conclusion that the practices are to the prejudice and injury of the public is unsupported. See *Federal Trade Commission* v. *Keppel & Bro.*, 291 U.S. 304.

It is too late seriously to entertain doubt that the facts set forth show unfair acts and practices within the meaning of § 45(a) of the Act, *supra. Federal Trade Commission* v. *Keppel & Bro.*, n. 1, *supra.* And the courts have uniformly held such means of promoting the sale of merchandise through the channels of interstate commerce to be "in commerce" as defined in §44. *Notwithstanding the actual lotteries are conducted wholly within a state they are integral parts of the sale of goods in interstate commerce. Modernistic Candies, Inc.* v. *Federal Trade Commission,* 145 F. 2d 454 (7th Cir.); *Lichtenstein* v. *Federal Trade Commission,* 194 F. 2d 607 (9th Cir.). See, also, *Colon* v. *Federal Trade Commission,* 193 F. 2d 179 (2d Cir.); *Brewer & Sons* v. *Federal Trade Commission,* 158 F. 2d 74 (6th Cir.); *Consolidated Mfg. Co.* v. *Federal Trade Commission,* 199 F. 2d 417 (4th Cir.); *Gay Games* v. *Federal Trade Commission,* 204 F. 2d 197 (10th Cir.).[2] Our own court has applied this rule in two cases where the petitioner manufactured and sold the push cards in interstate commerce. *Hamilton Manufacturing Co.* v. *Federal Trade Commission,* 90 U.S. App. D.C. 169, 194 F. 2d 346; *U.S. Printing and Novelty Co.* v. *Federal Trade Commission,* n. 2, *supra.* The rule is equally applicable where, as in the case before us, the devices, though not manufactured or sold by petitioners, are shipped by them in interstate commerce and are designed to and in fact are used to suggest and encourage merchandising by gambling. *Modernistic Candies, Inc.* v. *Federal Trade Commission, supra.*

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[2] Petitioners' reliance upon *United States* v. *Halseth,* 342 U.S. 277, for a contrary view is misplaced. *Lichtenstein* v. *Federal Trade Commission, supra.* See, also, U.S. *Printing and Novelty Co.* v. *Federal Trade Commission,* 92 U.S. App. D.C. 298, 204 F. 2d 737, *cert. denied,* 346 U.S. 830.

Petitioners argue that the order, meaning no doubt the findings, lacks the support of substantial evidence. There was ample evidence, however, that a great volume of mail matter is distributed by petitioners throughout the country, including the push cards and other literature to which we have referred. This proof affords adequate basis for the findings, which in turn support the order, that the cards are designed and intended to be used in the sale of goods by a lottery and that they furnish others the means of conducting lotteries in the sale of the merchandise. Moreover, an officer of the company testified that a large number of petitioners' orders came in as a result of these push cards, which he called "sales cards."

The final objection to the order is that the complaint should have been dismissed against petitioner Flavia Galter, one of the company's officers but not active in its business. The Commission did dismiss the complaint against her in her individual capacity, and no operative part of the order runs against her by name. The objection accordingly is without substance.

The order of the Commission will be enforced, and it is

Affirmed.

FINAL DECREE OF COURT OF APPEALS

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEYMOUR SALES COMPANY et al.,
Petitioners,
v.
FEDERAL TRADE COMMISSION,
Respondent.
No. 12064

FINAL DECREE

Seymour Sales Company, a corporation, Seymour Galter, individually and as an officer of said corporation, and Flavia Galter, as an officer of said corportion, petitioners, hving filed in this Court on January 20, 1954, their petition to review and set aside an order to cease and desist issued against said Seymour Sales Company and said Seymour Galter on November 25, 1953, by the Federal Trade Commission, respondent, in an administrative proceeding before said Commission entitled "In the Matter of Seymour Sales Company (and others), F.T.C. Docket No. 6060"; and the cause having been heard by the Court on briefs and oral argument; and the Court having rendered its decision on November 4, 1954, affirming said order;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that petitioner Seymour Sales Company, a corporation, and its officers, representatives, agents, and employees, and petitioner Seymour Galter, individually and as an offier of said corporation, and his

representatives, agents, and employees obey and and comply with the terms of the said order to cease and de desist;

AND IT IS FURTHER ORDERED, ADJDJUDGED AND DECREED that within ninety days after er entry of this decree petitioners shall file with the Federderal Trade Commission a report in writing setting forth th in detail the manner and form in which they have compmplied with this decree.

Without prejudice to the right of the Uniteited States, as provided in section 5(1) of the Federal TraTrade Commission Act, to prosecute suits to recover civil vil penalties for violations of the said order to cease and desisssist, hereby enforced, and without prejudice to the right of the the Federal Trade Commission to institute and maintain in contempt proceedings for violation of this decree, this Courourt retains jurisdiction of this cause to enter such furthether orders herein from time to time as may become necessssary effectively to enforce compliance herewith in everyery respect and to prevent evasion hereof.

By the Court:

Henry W. Edgerton

E. Barrett Prettyman an
Charles Fahy
United States Circuit uit Judges.

Date: Nov. 26, 1954.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 484

SEYMOUR SALES COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, as yet unreported, is appended to the petition (13a-17a). The decision and order of the Federal Trade Commission appear at Pet. 3a-12a.

JURISDICTION

The judgment of the court of appeals (Pet. 18a-19a) was entered on November 26, 1954. The petition for a writ of certiorari was filed on December 14, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether petitioners' method of doing business—promotion of the sale of merchandise by means of lottery devices—is within the ambit of Section 5 of the Federal Trade Commission Act (prohibiting "unfair * * * acts or practices in commerce"), where the actual operation of the lottery device is intrastate, although the device itself and the merchandise sold thereby are shipped interstate.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

In a proceeding under Section 5 of the Federal Trade Commission Act, the Commission determined, after a full hearing, that petitioners were in violation of the statute, and entered a cease and desist order proscribing the method of doing business involved. The principal facts found by the Commission, held by the court of appeals to be

supported by substantial evidence, may be summarized as follows:

Petitioners carry on a mail order business in the sale and distribution of cameras, pens and other merchandise. The business is conducted in part through representatives who respond to advertising literature which petitioners distribute in great quantities throughout the United States. This literature includes descriptions of various articles of merchandise, order blanks, and a device known as a "push-card" with instructions for its use. Recipients are advised that they may receive an article of the described merchandise as a premium, "almost as a gift", through the use of the "push-card", which will also give an opportunity to "friends, relatives, neighbors and co-workers" to receive another item of the described merchandise "almost as a gift". The typical "push-card" pictures the item of merchandise involved, and contains 16 disks each bearing a feminine name, and each concealing a number determining the cost of each draw. A patron drawing certain numbers is charged the amount in cents of the number drawn, while all others are charged 29 cents for each draw. A certain designated number entitles the drawer to a prize of a ball-point pen. A master seal on the face of the card conceals the "lucky name". This name, to be uncovered after all the disks have been drawn, determines which of the disks entitles the holder to the merchandise prize. These devices have been used to distribute petitioners' goods, and the merchandise sold and distributed by this device are sold

and distributed by means of a game of chance, gift enterprise or lottery scheme. (Pet. 5a-11a.)

On the basis of these facts, the Commission concluded that petitioners were engaging in unfair acts and practices in interstate commerce, within the meaning of Section 5 of the Federal Trade Commission Act. The court of appeals unanimously affirmed the decision of the Commission and directed enforcement of its order, holding that the acts and practices occurred in the conduct of petitioners' own commerce, that such commerce was interstate, and that the acts and practices were "unfair" within the meaning of the statute.

ARGUMENT

Petitioners do not dispute the correctness of the facts found by the Commission, nor do they deny that the practices are "unfair" within the meaning of the statute as construed by this Court in *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, if the questioned practices are in interstate commerce. They argue, however, that the "push-card" lottery is conducted locally as an intrastate transaction beyond the jurisdiction of the Commission, citing *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U. S. 349, and *United States* v. *Halseth*, 342 U. S. 277. But, unlike the situation in the *Bunte* case, the entire scheme is not carried out within the borders of one state. The local transactions are but a part of the sale and distribution of petitioners' merchandise on an interstate basis, which involves both the interstate shipment of the "push-cards" and the merchandise sold thereby.

The practices here complained of are not merely of incidental effect on interstate commerce, as in *Federal Trade Commission* v. *Bunte Brothers,* 312 U.S. 349, and the other cases cited by petitioner, *Canfield Oil Company* v. *Federal Trade Commission,* 274 Fed. 571 (C. A. 6), and *Ward Baking Company* v. *Federal Trade Commission,* 264 Fed. 330 (C. A. 2). The various courts of appeals have uniformly held that schemes of the type here used are a means of promoting the sale of merchandise through the channels of interstate commerce,[1] and, as noted by the court below (Pet. 16a), although "the actual lotteries are conducted wholly within a state they are integral parts of the sale of goods in interstate commerce."

United States v. *Halseth, supra,* cited by petitioner as holding that a similar lottery scheme was purely local, is not apposite. This Court was concerned in that case with the initial act of mailing the lottery material as a violation of the criminal statute prohibiting the mailing of matter "concerning any lottery, gift enterprise, or similar scheme". 18 U. S. C. 1302. Halseth was held not to be in violation of the statute, not, as petitioner states, because the scheme was "local", but because the statute applied only to an "existing, going lottery or gambling scheme", and the "lottery or scheme would come into existence only if the addressee put

[1] *Colon* v. *Federal Trade Commission,* 193 F. 2d 179 (C.A. 2); *Modernistic Candies, Inc.* v. *Federal Trade Commission,* 145 F. 2d 454 (C.A. 7); *Lichtenstein* v. *Federal Trade Commission,* 194 F. 2d 607 (C.A. 9). Additional cases involving such schemes are cited in the Government's brief in opposition in *Halseth* v. *Federal Trade Commission,* No. 485, this Term.

the paraphernalia into operation." 342 U. S. at 280-281. And petitioners' guilt or innocence of violation of the criminal statute is of course immaterial to a proceeding under the Federal Trade Commission Act. For, as this Court ruled in the *Keppel* case, *supra,* the sale of merchandise by offering it to the public on a gambling basis is "unfair" within the meaning of the statute, irrespective of whether the conduct comes within "criminal statutes imposing penalties on gambling, lotteries and the like." 291 U.S. at 313.[2]

[2] In subsequent legislation, moreover, Congress has been at pains to preserve the distinction, made in *Keppel,* between criminal statutes relating to gambling and the Commission's power to deal, by cease and desist order, with merchandising-through-gambling schemes. See Gov't brief in opposition in No. 485.

CONCLUSION

The decision below is clearly correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JANUARY 1955.

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